

In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. See 86 Ill. Adm. Code 130.1940. (This is a GIL).

January 6, 2003

Dear Xxxxx:

This letter is in response to your letter dated September 20, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at www.revenue.state.il.us/Laws/regs/part1200/.

In your letter, you have stated and made inquiry as follows:

We are in the process of updating our taxability guidelines as they relate to providers of services for telecommunication companies. Following is a fact pattern for a service provider and the issues in which taxability decisions are needed.

Fact Pattern:

Company A is a service provider. Company A's customers are telecommunication equipment manufacturers and telecommunications service providers. Company A's services can best be described as follows.

(Equipment is defined as 'telecommunication equipment located at ultimate user sites')

- New Equipment Installation
- Installation of Equipment Enhancements to Existing Equipment
- Replacement Equipment Installation
- Equipment Repairs
- Engineering Services

Company A **does not purchase or resell** any of the equipment installed. Company A's customers contact Company A to provide the above services on their behalf. Company A only invoices its customers (*telecommunication equipment manufacturers and telecommunication service providers*) for the services provided. Depending on the type of service provided, the telecommunication equipment manufacturers and telecommunication service providers may or may not invoice *their* customers.

Company A rarely solicits new customers. Company A has been selected by its customers as a 'preferred service provider.' Services are provided both on fixed fee and time & expense arrangements.

Company A does provide miscellaneous installation materials, supplies, and accessories (examples include wiring, fuse panels, switches, nuts and bolts, etc.) as part of their services. These items are generally incidental to the installation process and constitute 10% or less of the cost of the service provided. On occasion, the cost percentage can reach 25% or be billed as a flat 25% pursuant to special contract arrangements. Materials, supplies, and accessories are purchased both in stock quantities and for specific jobs. The items are either shipped to one of Company A's warehouses to be withdrawn as needed or earmarked and shipped directly to a job site.

The equipment which Company A installs for its customers can be replaced when broken or enhanced, however, it is generally affixed to real property.

Questions:

1. Should Company A be collecting sales tax from its customers on any of the installation or repair services referenced above? ***Please remember that Company A is provided with the equipment that is being installed by Company A's customer(s).. Company A does not furnish or bill for the equipment to be installed. Company A merely furnishes a service, and any necessary miscellaneous installation materials and supplies which become the property of the customer after installation.***
2. Company A currently remits sales/use tax on the purchase of installation materials, supplies, and miscellaneous accessories provided as a component of their services. Should Company A be remitting sales/use tax on these purchases or should Company A be purchasing these items for resale and separately stating the tangible items on the invoices and billing the customer applicable sales tax? ***Please remember that the cost of these incidentals in comparison to the total service fee is generally 10% or less. There are a few contracts where the cost is 25%, or the customer is billed a 25% fee no matter the actual cost.***
3. If a customer hires Company A to provide one of the services above for its customer, and Company A's customer bills their customer for the equipment installed and the services provided by Company A, can Company A accept a resale certificate from its customer and purchase all incidental materials tax exempt?
4. Is telecommunication equipment considered real property or tangible personal property?
5. Are there any special exemptions or tax exclusions when providing services for the telecommunications industry?
6. If Company A has a warehouse in your state at which materials, supplies, and accessories are shipped and stored until use, does Company A owe sales/use

tax to your state or to the state in which the goods are ultimately used in an installation service (which mayor may not be your state)?

7. If Company A does not have a warehouse in your state, however, pulls items from another state's warehouse and has paid sales/use tax to the warehouse state, does not company A have any additional tax liability due to your state when using the materials for an installation job in your state?
8. Company A's personnel uses various small tools, such as pliers, screwdrivers, etc. to perform the installation services. Are these items subject to sales/use tax at the point of purchase? Does it make any difference in regard to taxability of the tools, etc. are specialized and only usable for one job?
9. If a customer provides a tax exemption or direct pay certificate to Company A, and if your state treats Company A as a 'service provider,' can Company A accept the exemption or direct pay certificate in good faith?
10. Are there any statutes, regulations, court cases, letter rulings or publications that would be helpful to Company A with their taxability decision-making process? If yes, please reference or attach to your response.

We appreciate your assistance with this process. Please contact me with any questions regarding this request.

The Retailers' Occupation Tax Act imposes a tax upon persons engaged in the business of selling tangible personal property at retail. A "sale at retail" is any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. See the enclosed copies of 86 Ill. Adm. Code 130.101 and 130.201.

Please find enclosed copies of 86 Ill. Adm. Code 130.1940 and 130.2075 regarding the tax liabilities of contractors in Illinois. The term "construction contractors" includes general contractors, subcontractors, and specialized contractors such as landscape contractors. The term "contractor" means any person or persons who are engaged in the occupation of entering into and performing construction contracts for owners. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. Therefore, any tangible personal property that general contractors or subcontractors purchase that will be permanently affixed to or incorporated into real property in this State will be subject to Use Tax. If contractors did not pay the Use Tax liability to their suppliers, contractors must self-assess their Use Tax liability and pay it directly to the Department.

Contractors incur Retailers' Occupation Tax upon the sale of items that are not permanently affixed to real estate. However, please note that Section 1 of the Retailers' Occupation Tax Act states that "[c]onstruction contracts for the improvement of real estate consisting of video, security, and all telecommunication systems do not constitute engaging in a business of selling tangible personal property at retail within the meaning of this Act if they are sold at one specified contract price". Consequently, even if some items used in such contracts are not permanently affixed, the liability incurred by the contractor is a Use Tax liability if the provisions of this section are met.

If a customer provides the items of tangible personal property to the construction contractor to be installed into realty, the customer and not the construction contractor incurs the Use Tax upon the purchase of that tangible personal property.

If the items are not permanently affixed to realty, then a service situation exists. Retailers' Occupation Tax and Use Tax do not apply to receipts from sales of personal services. Under the Service Occupation Tax Act, servicemen are taxed on tangible personal property transferred incident to sales of service. For your general information we are enclosing a copy of 86 Ill. Adm. Code Part 140 regarding sales of service and Service Occupation Tax.

The purchase of tangible personal property that is transferred to service customers may result in either Service Occupation Tax liability or Use Tax liability for the servicemen, depending upon how the serviceman is classified. There are four ways that the tax can be calculated: (1) separately stated selling price; (2) 50% of the entire bill; (3) Service Occupation Tax on cost price if they are registered de minimis servicemen; or, (4) Use Tax on cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act.

Using the first method, servicemen may separately state the selling price of each item transferred as a result of sales of service. The tax is based on the separately stated selling price of the tangible personal property transferred. If servicemen do not wish to separately state the selling price of the tangible personal property transferred, those servicemen must use the second method where they will use 50% of the entire bill to their service customers as the tax base. Both of the above methods provide that in no event may the tax base be less than the cost price of the tangible personal property transferred. Under these methods, servicemen may provide their suppliers with Certificates of Resale when purchasing the tangible personal property to be transferred as a part of the sales of service. Upon selling their product, they are required to collect the corresponding Service Use Tax from their customers. See 86 Ill. Adm. Code 140.106.

The third way servicemen may account for their tax liability only applies to de minimis servicemen who have either chosen to be registered or are required to be registered because they incur Retailers' Occupation Tax liability with respect to a portion of their business. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). See, 86 Ill. Adm. Code 140.101(f) enclosed. This class of registered de minimis servicemen is authorized to pay Service Occupation Tax (which includes local taxes) based upon the cost price of tangible personal property transferred incident to sales of service. Servicemen that incur Service Occupation Tax collect the Service Use Tax from their customers. They remit the tax to the Department by filing returns and do not pay tax to suppliers. They provide suppliers with Certificates of Resale for the property transferred to service customers. See 86 Ill. Adm. Code 140.108.

The final method of determining tax liability may be used by de minimis servicemen that are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Servicemen may qualify as de minimis if they determine that their annual aggregate cost price of tangible personal property transferred incident to sales of service is less than 35% of their annual gross receipts from service transactions (75% in the case of pharmacists and persons engaged in graphic arts production). Such de minimis servicemen may pay Use Tax to their suppliers or may self-assess and remit Use Tax to the Department when making purchases from unregistered out-of-State suppliers. Those servicemen are not authorized to collect "tax" from their service customers because they, not their customers, incur the tax liability. Those servicemen are also not liable for Service Occupation Tax. It should be noted that servicemen no longer have the option of determining

whether they are de minimis using a transaction by transaction basis. See 86 Ill. Adm. Code 140.109.

In multi-service situations, a primary serviceman's cost price is determined either by the separately stated selling price of the tangible personal property transferred from a secondary serviceman or if the secondary serviceman does not separately state the cost of goods, it is presumed that the primary serviceman's cost price is 50% of the secondary serviceman's total charge. See 86 Ill. Adm. Code 140.301, enclosed. When both primary servicemen and secondary servicemen are registered, primary servicemen may give a Certificate of Resale to registered secondary servicemen for any tangible personal property purchased. Primary servicemen could then collect Service Use Tax from their customers based upon the separately stated selling price of the property or 50% of the bill to the service customers. If primary servicemen are registered and de minimis, they may choose to remit Service Occupation Tax to the Department based upon their cost price of tangible personal property purchased from the secondary serviceman. If the cost price of the tangible personal property is not separately stated by the secondary serviceman, the cost price will be deemed to be 50% of the total bill from the secondary serviceman. Primary servicemen provide the secondary servicemen with Certificates of Resale if the secondary servicemen are registered.

Public Act 89-675, effective August 14, 1996, states that if an unregistered de minimis serviceman subcontracts service work to an unregistered de minimis secondary serviceman, the primary serviceman does not incur a Use Tax liability if the secondary serviceman (i) has paid or will pay Use Tax on his or her cost price of any tangible personal property transferred to the primary serviceman and (ii) certifies that fact in writing to the primary serviceman.

Enclosed is a copy of 86 Ill. Adm. Code 150.310 concerning "Exemptions to Avoid Multi-State Taxation." The temporary storage exemption is available for tangible personal property which is "acquired outside this State and which subsequent to being brought into this State and stored here temporarily, is used solely outside this State or is physically attached to or incorporated into other tangible personal property that is used solely outside this State, or is altered by converting, fabricating, manufacturing, printing, processing or shaping, and, as altered, is used solely outside this State." 86 Ill. Adm. Code 150.310(a)(4). Please note that if the item were sold to a customer for use in Illinois, this exemption would not be available.

As you can see, this exemption only applies to transactions in which the materials are acquired outside this State and after their temporary stay in Illinois are shipped out of Illinois and used solely outside Illinois. When property is located in Illinois at time of sale, or if such property is not acquired outside this State, the transaction is an Illinois retail sale subject to Retailers' Occupation Tax liability. Temporary storage is not applicable in transactions where there is Retailers' Occupation Tax liability because the exemption is limited to situations where the only liability that can be involved is Use Tax. See 86 Ill. Adm. Code 150.310(b), enclosed.

In order to properly document this exemption, purchasers should give certificates to their sellers which state that the raw materials are acquired outside Illinois and brought into Illinois only temporarily for converting, fabricating, manufacturing, printing, processing, or shaping, and are subsequently shipped out of Illinois to be used solely outside the State of Illinois.

In the situation you describe, Use Tax is owed on the tools used. A credit for taxes properly due and paid to other states is available in Illinois. See Section 150.310, enclosed.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.